STATE OF MICHIGAN

COURT OF APPEALS

ANNIE B. WARE, Personal Representative of the Estate of ROSEMARY WARE, Deceased,

Plaintiff-Appellee,

v

HOLY CROSS HOSPITAL OF DETROIT, INC., ROMAN W. ANDRUSHKIW, M.D., and JOAN PRICE, M.D.,

Defendants,

and

VILMA DRELICHMAN, M.D.,

Defendant-Appellant.

UNPUBLISHED
September 14, 1999

No. 207431
Wayne Circuit Court
LC No. 95-527245 NH

Before: Zahra, P.J., and Saad and Collins, JJ.

PER CURIAM.

In this medical malpractice action, defendant Vilma Drelichman, M.D. ("Drelichman") appeals by leave granted the trial court's order denying her motion for summary disposition brought pursuant to MCR 2.116(C)(7) (statute of limitations). We reverse and remand.

On January 7, 1993, Rosemary Ware was admitted to Holy Cross Hospital ("Holy Cross") with complaints of shortness of breath, cough, fever, chills and chest pain. A blood culture drawn in the emergency room revealed the presence of strep pneumonia. Defendant Roman W. Andrushkiw, M.D. ("Andrushkiw") was Rosemary's attending physician. Defendant Joan Price, M.D. ("Price") examined Rosemary as an infectious disease consultant. Rosemary was placed on antibiotics, but her condition continued to deteriorate until she died on January 17, 1993, at the age of thirty-two.

On May 20, 1994, plaintiff Annie B. Ware was appointed the personal representative of Rosemary's estate. On January 13, 1995, plaintiff served a notice of intent to file suit[1] on Holy Cross,

Andrushkiw, and Price. On September 15, 1995, plaintiff filed a complaint against the same individuals and hospital. Plaintiff alleged that Andrushkiw and Price were negligent in their treatment of Rosemary and that negligence was a proximate cause of her death. In particular, plaintiff alleged that Price and Andrushkiw were negligent in failing to perform repeat blood cultures on Rosemary when her condition showed no signs of improvement, failing to order appropriate antibiotic treatment for Rosemary's sepsis, failing to order a bronchoscopy and CT scan when it became apparent that her condition was not improving, and failing to transfuse Rosemary in response to her hypoxemia.

In October 1995, plaintiff submitted interrogatories to Holy Cross wherein plaintiff requested that the hospital identify the author of a number of orders contained within Rosemary's medical records. In its answers to those interrogatories, filed on January 11, 1996, Holy Cross identified Drelichman as the author of several of those orders. At her deposition on June 13, 1996, Price testified that Drelichman took over the care of Rosemary on January 11, 1993. During her July 16, 1996, deposition, Drelichman similarly testified that on January 11, 1993, she took over for Price as the infectious disease consultant.

On September 30, 1996, plaintiff had Rosemary's original medical chart examined by a forensic document analyst. The analyst opined that entries made in Rosemary's chart had been altered and expanded; however, he did not give an opinion regarding the time period in which this alleged document alteration occurred.

On December 19, 1996, plaintiff filed a motion to amend her complaint to add Drelichman as a defendant in the case and the trial court granted the motion. Plaintiff filed her amended complaint on March 12, 1997. The amended complaint asserted no new theories of negligence. Shortly thereafter, Drelichman moved for summary disposition on the ground that the statute of limitations had expired on any claims against her. The trial court denied her motion, concluding that issues of fact existed with respect to whether Drelichman and/or others had attempted to conceal Drelichman's involvement in Rosemary's case.

On appeal, Drelichman argues that the trial court erred in denying her motion for summary disposition under MCR 2.116(C)(7) because plaintiff's suit against her was time-barred. We agree. This Court reviews a grant or denial of a motion for summary disposition de novo to determine whether the moving party was entitled to judgment as a matter of law. *Rheaume v Vandenberg*, 232 Mich App 417, 420; 591 NW2d 331 (1998). A grant of summary disposition under MCR 2.116(C)(7) is proper where a claim is barred by the applicable statute of limitations. *Travelers Ins Co v Guardian Alarm Co of Michigan*, 231 Mich App 473, 477; 586 NW2d 760 (1998). When reviewing a decision regarding summary disposition pursuant to MCR 2.116(C)(7), this Court considers all pleadings, affidavits, and other documentary evidence submitted by the parties and construes them in favor of the plaintiff. *Rheaume*, *supra*.

MCL 600.5838a(2); MSA 27A.5838(1)(2) provides, in pertinent part, as follows:

> (2) Except as otherwise provided in this subsection, an action involving a claim based on medical malpractice may be commenced at any time within the applicable period

> prescribed in section 5805 or sections 5851 to 5856, or within 6 months after the plaintiff discovers or should have discovered the existence of the claim, whichever is later.

Thus, pursuant to MCL 600.5838a(2); MSA 27A.5838(1)(2), plaintiff had three time periods within which she could have timely amended her complaint to add Drelichman to the case. *Poffenbarger v Kaplan*, 224 Mich App 1, 11; 568 NW2d 131 (1997). First, pursuant to the general malpractice period of limitation prescribed in MCL 600.5805(4); MSA 27A.5805(4), plaintiff could have sued Drelichman within two years of January 17, 1993.[2] *Id.* Second, plaintiff could have invoked the wrongful death savings provision in MCL 600.5852; MSA 27A.5852, which would have permitted her to commence her action against Drelichman within two years after being appointed the personal representative of the estate, as long as the suit was brought within three years after the expiration of the two-year malpractice limitation period. *Id.* Plaintiff was appointed the personal representative on May 20, 1994; thus, under this option, she had until May 20, 1996, to bring suit against Drelichman. Having filed her motion to amend her complaint to add Drelichman on December 19, 1996,[3] plaintiff clearly missed the deadline under the first two applicable periods of limitation prescribed in MCL 600.5838a(2); MSA 27A.5838(1)(2).

Plaintiff's third option was to sue Drelichman within the six month discovery period. *Id.* In *Poffenbarger, supra,* this Court explained that

> [a] plaintiff is deemed to have discovered a cause of action when the plaintiff discovers, or through the exercise of reasonable diligence should have discovered, an injury and its possible cause. The test of whether the plaintiff discovered or should have discovered a cause of action is an objective test. The plaintiff need only be aware that she has a possible cause of action, not that she has likely cause of action. Once a plaintiff is aware of an injury and its possible cause, the plaintiff is equipped with the necessary knowledge to preserve and diligently pursue her claim. The law imposes on such a plaintiff "a duty to diligently pursue the resulting legal claim." [*Id.;* citations omitted.]

Plaintiff in this case clearly was aware of her cause of action by January 13, 1995, when she filed her notice of intent to file suit, asserting that Rosemary's death resulted from a failure to diagnose and treat her secondary infection.

Although she was aware of her cause of action as of January 13, 1995, however, plaintiff did not move to amend her complaint to add Drelichman until almost a year later. Plaintiff contends that because the medical records were illegible, she did not know of Drelichman's identity and the extent of her involvement until she received the report of her document analyst in September 1996. She reasons that the discovery period did not begin to run until this point. Plaintiff's argument fails. As this Court explained in *Poffenbarger, supra* at 13:

> That plaintiff initially may not have been aware of [the defendant's] identity does not alter her duty of diligence in discovering a potential cause of action. The discovery

> period applies to discovery of a possible claim, not the discovery of the defendant's identity. [Citation omitted.]

Thus, if the medical records were illegible, because plaintiff knew of a possible cause of action, it was incumbent upon her to investigate further, and in a timely fashion.

Moreover, even if knowledge of Drelichman's identity were crucial to the commencing of the six-month discovery period, plaintiff was still untimely in pursuing her claims. When answers to interrogatories sent by plaintiff to Holy Cross were served on plaintiff on January 11, 1996, plaintiff learned that Drelichman was the author of several orders regarding Rosemary's antibiotic regime. Plaintiff contends that because the interrogatory answers did not indicate *who* Drelichman was, i.e., that she was the infectious disease consultant who had replaced Price, those answers were insufficient to put her on notice of the extent of Drelichman's involvement in Rosemary's care. We find this argument to be without merit. The interrogatories were specifically targeted to the dates wherein plaintiff claims that Rosemary's condition was not improving and more aggressive treatment was warranted. In addition, the interrogatories went directly to the issue of antibiotic therapy. Thus, the answers to the interrogatories put plaintiff on notice that, at the very least, Drelichman had participated in crucial aspects of Rosemary's care. Assuming that the six month period began to run on January 11, 1996, when the answers to the interrogatories were served on plaintiff, as opposed to January 13, 1995, plaintiff's motion to amend her complaint to add Drelichman was still untimely.

Finally, even assuming that the answers to interrogatories did not put plaintiff on notice that Drelichman was involved in Rosemary's care during the critical time period, Price's testimony at her deposition on June 13, 1996, certainly did. Plaintiff acknowledges that Price testified that Drelichman took over for Price on January 11, 1993. Giving plaintiff the benefit of the latest possible date she could be deemed to have known of her cause of action against Drelichman, her motion to amend to add Drelichman, filed more than six months after June 13, 1996, was not timely.

Plaintiff contends, however, that the fraudulent concealment provision of MCL 600.5838a; MSA 27A.5838(1), apply to revive her claims against defendant. At the very least, argues plaintiff, summary disposition is inappropriate because there exists a genuine issue of material fact with regard to whether Drelichman engaged in fraudulent concealment. We disagree. MCL 600.5838a(2)(a); MSA 27A.5838(1)(2)(a) provides that the limitation periods prescribed in MCL 600.5838a(2); MSA 27A.5838(1)(2) do not apply to a plaintiff

> *[i]f discovery of the existence of the claim was prevented* by the fraudulent conduct of the health care professional against whom the claim is made or a named employee or agent of the health professional against whom the claim is made, or of the health facility against whom the claim is made or a named employee or agent of a health facility against whom the claim is made. [Emphasis added.]

This fraudulent concealment provision does not apply in this case because, as discussed above, regardless of any actions allegedly taken or not taken by Drelichman and/or her codefendants with regard to identifying Drelichman as a physician involved in Rosemary's case, plaintiff knew of her cause

of action as of January 13, 1995, when she filed the notice of intent, or at the very latest, after the deposition of Price on June 13, 1996, wherein Price identified Drelichman by name as the person who took over as the infectious disease consultant in Rosemary's case. *Id.* Again, plaintiff's motion to amend to add Drelichman was not filed until December 19, 1996, more than six months later. Because plaintiff did not file her motion to amend to add Drelichman within any of the applicable time periods prescribed in MCL 600.5838a(2); MSA 27A.5838(1)(2), her action was time-barred and Drelichman was entitled to summary disposition as a matter of law.

Reversed and remanded to the trial court for entry of an order granting summary disposition in favor of defendant Vilma Drelichman, M.D. We do not retain jurisdiction.

/s/ Brian K. Zahra
/s/ Henry William Saad
/s/ Jeffrey G. Collins

[1] MCL 600.2912b(2); MSA 27A.2912(2)(2).

[2] The accrual date of a medical malpractice action is the date of the act or omission upon which the claim is based. MCL 600.5838a(1); MSA 27A.5838(1)(1); *Lumley v Univ of Michigan Bd of Regents*, 215 Mich App 125, 131; 544 NW2d 692 (1996). In plaintiff's affidavit of merit, filed with her complaint, she states that on January 12, 1993, because Rosemary's condition was not improving, appropriate antibiotics should have been given for her secondary infection, recultures of blood and sputum should have been performed and a bronchoscopy and/or CT scan should have been performed. Presumably, since none of this action was taken prior to her death on January 17, 1993, these acts of alleged malpractice were continuing. Thus, for the purpose of argument, and giving plaintiff the benefit of the doubt, the last acts of malpractice occurred on January 17, 1993, the date of Rosemary's death.

[3] Plaintiff is deemed to have brought her action against Drelichman as of this date, as opposed to the date when the actual amended complaint was filed, because the limitation period is tolled from the date a plaintiff moves to add defendants rather than the date a plaintiff's amended complaint is actually filed. *Poffenbarger, supra* at 8.